UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK, *et al.*, Plaintiffs v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1233 (CKK)

MEMORANDUM OPINION

This case comes before the Court upon the filing of Microsoft's Motion to Vacate Orders Requiring Public Access to Depositions. Specifically, Microsoft's motion addresses two related Orders issued by Judge Thomas Penfield Jackson on August 11, 1998, and April 1, 1999, respectively. Microsoft's motion is not opposed by the non-Settling States, however various press-organizations[1] (the "Media Intervenors"), filing as intervenors, oppose Microsoft's motion. Having reviewed Microsoft's motion, the Media Intervenors' opposition, Microsoft's reply, the record in this case, and the relevant case law, this Court concludes that the previous Orders, premised on 15 U.S.C. § 30, concerning public access to depositions, should be vacated as to Civil Action No. 98-1233, but not as to Civil Action No. 98-1232.

I. BACKGROUND

On May 18, 1998, the United States and a group of State Plaintiffs filed separate civil

[1]The Media Intervenors are the Associated Press, Cable News Network, Dow Jones & Co., Inc., the Washington Post, USA Today, and the San Jose Mercury News, Inc.

complaints asserting antitrust violations by Microsoft and seeking preliminary and permanent injunctions barring the company's allegedly unlawful conduct. *See United States v. Microsoft Corp.*, 253 F.3d 34, 47 (D.C. Cir. 2001). The suit filed by the United States was designated as Civil Action No. 98-1232, while the suit filed by the group of States was designated as Civil Action No. 98-1233. In an order dated May 22, 1998, pursuant to Microsoft's motion and in accordance with Federal Rule of Civil Procedure 42(a), Judge Jackson ordered the consolidation of Civil Action Nos. 98-1232 and 98-1233 "for all purposes, pending further order of the Court." *United States v. Microsoft Corp.*, Nos. 98-1232 and 98-1233 (D.D.C. May 22, 1998).

Thereafter, various press organizations, acting as "prospective intervenors" in the consolidated action, filed motions "to enforce a right of access, pursuant to 15 U.S.C. § 30, to all depositions taken in this [consolidated] action." *United States v. Microsoft Corp.*, Nos. 98-1232 and 98-1233 (D.D.C. August 11,1998) (order granting in part prospective intervenors motion for leave to intervene to enforce a generic "right of access"). The "little known and even less used" Publicity in Taking Evidence Act of 1913, 15 U.S.C. § 30, relied upon by the previous group of intervenors provides:

> In the taking of depositions of witnesses for use in any suit in equity brought by the United States under sections 1 to 7 of [Title 15, United States Code], and in the hearings before any examiner or special master appointed to take testimony therein, the proceedings shall be open to the public as freely as are trials in open court; and no order excluding the public from attendance on any such proceedings shall be valid or enforceable.

United States v. Microsoft Corp., 165 F.3d 952, 954 (D.C. Cir. 1999) (quoting 15 U.S.C. § 30). In an Order dated August 11, 1998, Judge Jackson recognized the previous intervenors' right to access pursuant to Section 30 and ordered, with some limitations, admission of the "intervenors

and all other members of the public" in "all depositions to be taken henceforth in this [consolidated] action." *Microsoft*, Nos. 98-1232 and 98-1233 (D.D.C. August 11, 1998). A subsequent Order dated April 1, 1999, provided procedures enabling and governing public access to "all further depositions in this [consolidated] action." *United States v. Microsoft Corp.*, Nos. 98-1232 and 98-1233 (D.D.C. April 1, 1999).[2]

Judge Jackson certified his ruling for interlocutory appeal to the U.S. Court of Appeals for the District of Columbia Circuit, and the Court of Appeals ultimately affirmed the ruling. *See Microsoft*, 165 F.3d at 960. In its affirmance, the Court of Appeals addressed two issues raised by Microsoft. First, Microsoft argued that the term "deposition" in 15 U.S.C. § 30 carried a different meaning in 1913, when Section 30 was written, and therefore, the term "deposition," as used in Section 30, "cannot have been intended to apply to pretrial discovery depositions." *Id.* at 954. Second, Microsoft argued that Section 30 had been superseded by Federal Rule of Civil Procedure 26(c). *Id.* at 958-60. The Court of Appeals rejected both arguments. *Id.* at 958, 960. Notably, the appellate panel did not address the consolidated nature of the cases, nor the fact that 15 U.S.C. § 30, by its terms, applies only in actions "brought by the United States." *See generally id.*; 15 U.S.C. § 30.

Much has happened in the consolidated cases since the Court of Appeals issued its decision concerning Section 30. Since that time, Judge Jackson issued his findings of fact, conclusions of law, and order of remedy. *See United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999) (setting forth findings of fact); *United States v. Microsoft Corp.*, 87 F. Supp. 2d

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[2]The Court emphasizes that 15 U.S.C. § 30 was the *exclusive basis* for Judge Jackson's August 11, 1998, recognition of a "right of access," as well as for his ensuing Order, dated April 1, 1999, designating procedures for public and press access to depositions.

30 (D.D.C. 2000) (setting forth conclusions of law); *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59 (D.D.C. 2000) (entering final judgment and ordering the remedial division of Microsoft Corporation into two distinct companies). Judge Jackson concluded that Microsoft violated Sections 1 and 2 of the Sherman Act. *See generally Microsoft*, 87 F. Supp. 2d 30 (D.D.C. 2000). Significantly, the trial court, in the words of the Court of Appeals, "found the State antitrust laws coterminous with §§ 1 and 2 of the Sherman Act." 253 F.3d at 48; *see also* 87 F. Supp. 2d at 54-56. Correspondingly, Judge Jackson held Microsoft liable for violations of the state antitrust laws analogous to Sections 1 and 2 of the Sherman Act in each of the nineteen Plaintiff States and the District of Columbia.

On appeal, the D.C. Circuit deferred to Judge Jackson's factual findings, altered the finding of liability affirming in part and reversing in part, and vacated the remedy decree. *See generally Microsoft*, 253 F.3d 34. The Court of Appeals found no fault in the trial court's analogous treatment of the Sherman Act and the corresponding state law claims and, in fact, engaged in similarly analogous treatment of the Federal and State antitrust claims. *Id.* at 46 ("Our judgment extends to the District Court's findings with respect to the state law counterparts of the plaintiffs' Sherman Act claims."). Thus, inasmuch as the Court of Appeals affirmed the trial court's finding of liability pursuant to Section 2 of the Sherman Act, it affirmed the finding of liability as to each Plaintiff State's counterpart antitrust statute.

The Court of Appeals remanded the cases to the district court with instructions to hold a "remedies-specific evidentiary hearing" and to order a new remedy in light of the revised liability findings. *Microsoft*, 253 F.3d at 97-108. On remand, the consolidated cases were reassigned to Judge Colleen Kollar-Kotelly, and this Court issued a Scheduling Order setting forth a schedule

for the two cases to proceed through joint discovery toward a joint remedies-specific evidentiary hearing. *See United States v. Microsoft Corp.*, Nos. 98-1232 and 98-1233 (D.D.C. September 28, 2001) (setting discovery schedule). Notwithstanding the expedited discovery schedule set forth in this Court's Scheduling Order, this Court, in a separate Order, required that the parties in the two consolidated cases enter into intensive settlement negotiations for a limited period of time prior to commencing with discovery. *See United States v. Microsoft Corp.*, Nos. 98-1232 and 98-1233 (D.D.C. September 28, 2001) (order requiring that the parties enter into settlement negotiations).

The settlement negotiations did not resolve both cases in their entirety. However, the United States and Microsoft were able to reach a resolution in Civil Action No. 98-1232 in the form of a proposed consent decree. As a result, the Court vacated the discovery schedule with regard to Civil Action No. 98-1232, and proceedings toward a remedies hearing in Civil Action No. 98-1232 have ceased. *See United States v. Microsoft Corp.*, Nos. 98-1232 and 98-1233 (D.D.C. November 2, 2001) (vacating the September 28, 2001, Scheduling Order with regard to Civil Action No. 98-1232). Instead, the United States and Microsoft have commenced the process for obtaining judicial approval of the proposed consent decree pursuant to the Tunney Act, 15 U.S.C. § 16(b)-(h).

The settlement negotiations were partially successful with regard to the States' case, Civil Action No. 98-1233; a portion of the Plaintiff States joined in the settlement between the United States and Microsoft. Consequently, these so-called "Settling States" have elected not to proceed to a remedies-specific hearing in Civil Action No. 98-1233. *See United States v. Microsoft Corp.*, Nos. 98-1232 and 98-1233 (D.D.C. November 8, 2001).

Those states which opted not to join the settlement between the United States and Microsoft, often called the "non-Settling States," have proposed a remedy distinct from that presented in the proposed consent decree. Because of the continuing dispute between the non-Settling States and Microsoft regarding the appropriate remedy for Microsoft's anticompetitive behavior, the September 28, 2001, Scheduling Order remains in place in the non-settling portion of Civil Action 98-1233, and litigation in that case will proceed to a remedies-specific hearing.

II. DISCUSSION

A. Publicity in Taking Evidence Act of 1913, 15 U.S.C. § 30

The August 11, 1998, Order regarding the rights of the public pursuant to 15 U.S.C. § 30 applied to both Civil Action No. 98-1232 and Civil Action No. 98-1233 because, at that time, Plaintiffs in the two cases were engaged in joint discovery for use in a joint proceeding. Likewise, the April 1, 1999, Order, which addressed the procedures governing depositions, applied to both cases due to the joint nature of the discovery. As recounted above, further proceedings in the two consolidated actions have since been divided into two independent tracks. Microsoft argues that because the forthcoming depositions will be noticed, not by the United States, but by the non-Settling States and/or Microsoft in preparation for the remedies-specific hearing in Civil Action No. 98-1233, the August 11, 1998, and April 1, 1999, Orders should be vacated as to Civil Action No. 98-1233.

On its face, 15 U.S.C. § 30 does not apply to suits brought by individual states, but applies only to suits "brought by the United States." 15 U.S.C. § 30. Consequently, the right of access recognized in Section 30 does not arise independently in Civil Action No. 98-1233. As the United States explained in an August 12, 1998, memorandum, "the issue of 15 U.S.C. [§]

30's applicability arises in the States' case [Civil Action No. 98-1233] only because of the consolidation of the States' case with the United States' case." Microsoft Mot., Ex. 4 at 3 n.2. Although the two cases have remained consolidated up to this point, there can be no dispute that the non-settling portion of Civil Action No. 98-1233 is proceeding down a different path than that of Civil Action No. 98-1232. Indeed, there is no formal period of discovery for the proceedings in Civil Action No. 98-1232, nor will the United States participate in the discovery conducted in connection with Civil Action No. 98-1233.[3] As a result, there remains no basis for the application of 15 U.S.C. § 30 to the depositions to be taken by the non-Settling Plaintiff States and Microsoft.

The fact that the two cases have been consolidated does not change this conclusion. Consolidation of cases is "permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933) (discussing the 28 U.S.C. § 734, the predecessor statute to Fed. R. Civ. P. 42(a)); *see also Cablevision Systems Development Co. v. Motion Picture Ass'n of America, Inc.*, 808 F.2d 133, 135-36 (D.C. Cir. 1987) (recognizing the holding in *Johnson*, but limiting its application on the facts). As the record in these cases reflects, rather than merging the rights of

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[3]In this regard, the Media Intervenors' focus on the "for use in" portion of 15 U.S.C. § 30 is misplaced, as the assertion that depositions to be taken by the non-Settling States in conjunction with Civil Action No. 98-1233 may be used in later proceedings involving the United States is entirely speculative at this time. At present, depositions being taken by the non-Settling States are taken "for use in" Civil Action No. 98-1233, an action which was not "brought" by the United States. 15 U.S.C. § 30. Thus, to apply 15 U.S.C. § 30 to depositions taken in conjunction with Civil Action No. 98-1233 based purely upon the speculation that the circumstances of Civil Action No. 98-1232 may change at some unknown point in the future would extend the reach of 15 U.S.C. § 30 well beyond its plain meaning.

the parties,[4] consolidation is a purely ministerial act which, *inter alia*, relieves the parties and the Court of the burden of duplicative pleadings. Hence, the mere fact of consolidation does not render 15 U.S.C. § 30 applicable to all depositions taken in conjunction with Civil Action No. 98-1233. In the present posture, because the discovery in Civil Action No. 98-1233 is independent from any action taken by the United States, the Court can conceive of no rational basis for the application of 15 U.S.C. § 30 to the depositions to be taken by the non-Settling States in Civil Action No. 98-1233. With the conclusion that the legal underpinning for the August 11, 1998, and April 1, 1999, Orders is no longer applicable to Civil Action No. 98-1233, there is no legal basis for the continued imposition of the provisions of those orders upon the parties to that case.

B. Federal Rule of Civil Procedure 26(c)

Seeming to recognize that 15 U.S.C. § 30 is inapplicable to the depositions to be taken in Civil Action No. 98-1233, the Media Intervenors argue in the alternative that Federal Rule of Civil Procedure 26(c) requires Microsoft to establish that "good cause" exists for the issuance of a protective order which would exclude the press and public from the depositions to be taken in that case. Rule 26(c) provides in pertinent part that:

> [u]pon motion by a party or by the person from whom discovery is sought . . ., the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . that discovery be conducted with no one present except persons designated by the

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[4]The independent nature of the parties' rights in these cases is exemplified by the fact that, aside from the finding of liability pursuant to Section 2 of the Sherman Act in both cases, the state-law causes of action in Civil Action No. 98-1233 resulted in an additional and distinct finding of liability against Microsoft. *See* 87 F. Supp. 2d at 54-55; *see also* 253 F.3d at 46.

court . . . .

Fed. R. Civ. P. 26(c)(5). Thus, where an individual or entity from whom discovery is sought wishes to exclude persons from a deposition, that individual or entity must obtain a protective order requiring such exclusion upon a finding of good cause. *Id.* The party seeking a protective order bears the burden of proving its necessity. *See Avirgan v. Hull*, 118 F.R.D. 252, 254 (D.D.C. 1987). Pursuant to Rule 26(c), Judge Jackson entered a Stipulation and Protective Order upon a finding that good cause exists for such an order, *United States v. Microsoft Corp.*, Nos. 98-1232 and 98-1233 (D.D.C. May 27, 1998) (Stipulation and Protective Order), and on remand, this Court confirmed that the previous Stipulation and Protective Order would remain in effect. *United States v. Microsoft Corp.*, Nos. 98-1232 and 98-1233 (D.D.C. September 28, 2001) (Scheduling Order indicating that "[t]he terms and conditions in the Stipulation and Protective Order entered by the Court on May 27, 1998, shall remain in effect and continue to apply to all discovery and further proceedings in this case.").

In its present form, the Stipulation and Protective Order permits the exclusion of "all persons other than the [court] reporter, counsel, and individuals . . . who have access to the appropriate category of information" only "when counsel for a party or witness deems that the answer to a question will result in the disclosure of Confidential or Highly Confidential Information." *United States v. Microsoft Corp.*, Nos. 98-1232 and 98-1233 (D.D.C. May 27, 1998) (Stipulation and Protective Order ¶ K.1.). Microsoft acknowledges these limitations in the Stipulation and Protective Order, but argues nonetheless that "Microsoft can demonstrate 'good cause' to close the depositions to the public." Microsoft Reply at 3-4. Despite Microsoft's argument in favor of an exclusion of the public that plainly exceeds the language of the existing

Stipulation and Protective Order, Microsoft does not request that the Court extend, alter, or amend the terms of the Stipulation and Protective Order to exclude the public. *Id.* at 8 ("Microsoft respectfully requests that the Court . . . confirm that depositions taken in the non-settling States' action are governed by the Protective Order."). In the absence of such a request to exclude the public, the Court will not do so *sua sponte*.[5] Accordingly, the Court confirms, though it need not do so, that the existing Stipulation and Protective Order remains in effect and continues to govern these proceedings. In this regard, the Court emphasizes that the existing Stipulation and Protective Order provides for exclusion of the public, and even some individuals involved in the litigation, only when the answer to a question at deposition will result in the disclosure of "Confidential Information" or "Highly Confidential Information" as defined in the Stipulation and Protective Order. *United States v. Microsoft Corp.*, Nos. 98-1232 and 98-1233 (D.D.C. May 27, 1998) (Stipulation and Protective Order ¶¶ A.9., A.10., K.1.).

[5]The Court notes that, in practice, rather than secure access to litigation proceedings (including depositions), protective orders generally address who is to be *excluded* from the litigation proceedings. *See generally* Fed. R. Civ. P. 26(c).

III. CONCLUSION

Based on the foregoing, the Court finds that the circumstances in the above-captioned action have changed substantially since the issuance of the August 11, 1998, and April 1, 1999, Orders. In accordance with these changes, the Court concludes that it is appropriate to vacate the August 11, 1998, and April 1, 1999, Orders as to Civil Action No. 98-1233. The Stipulation and Protective Order dated May 27, 1998, continues in effect until further Order of the Court. An appropriate Order accompanies this Memorandum Opinion.

January 28, 2002

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COLLEEN KOLLAR-KOTELLY
United States District Judge